

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.

OCTOBER TERM, 1978

FILED

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MICHAEL ANTHONY NOLAN, PETITIONER

MICHAEL RODAK, JR., CLERK

VS

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The Petitioner MICHAEL ANTHONY NOLAN petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A infra) is not yet reported. The opinion was filed on May 25, 1979.

JURISDICTION

The opinion of the Court of Appeals was entered on May 25, 1979. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

WHETHER PETITIONER'S MOTION FOR A MISTRIAL SHOULD HAVE BEEN GRANTED ON THE GROUNDS THAT ON CROSS-EXAMINATION A HIGHLY SUGGESTIVE AND PREJUDICIAL QUESTION WAS DIRECTED AT PETITIONER BY GOVERNMENT COUNSEL IN THE ABSENCE OF ANY FACTUAL BASIS OR GOOD FAITH BELIEF JUSTIFYING THAT QUESTION AND IN THE ABSENCE OF ANY CURATIVE INSTRUCTION BY THE COURT TO THE JURY.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, Petitioner was convicted of one

count of possession with intent to distribute heroin (21 USC §812), three counts of distribution of heroin (21 USC §812), and one count of conspiracy to possess and distribute heroin (21 USC §846). He was sentenced to serve concurrent terms of imprisonment of eight years with a special parole term of ten years on each of the five counts. Petitioner was at liberty on a \$25,000.00 bond pending appeal. The opinion of the Ninth Circuit expressly revoked that bond. Petitioner is presently in custody.

The evidence adduced at trial shows that a Sharon Simonini told undercover agents of the United States Drug Enforcement Administration that she would sell to them quantities of heroin and that her source of heroin was "her uncle", whom she never identified by name or physical description. Pursuant to subsequent negotiations, Simonini sold various quantities of heroin to the agents. The agents observed

Simonini meet with Petitioner on April 26, 1979 following a discussion with the agents and prior to her delivery of heroin to the agents. Petitioner and Simonini were also observed meeting on two other occasions. On May 4, 1979 Simonini left a meeting with the agents to procure some heroin. She was secretly followed to 260 Justin Drive in San Francisco which was Petitioner's residence. Surveillance had disclosed that Petitioner was inside. She entered and exited the house alone after remaining approximately fifteen minutes. She returned, with heroin, to her meeting with the agents at which time she was arrested. Pursuant to a search warrant, narcotics agents then entered and searched 260 Justin Drive wherein they found Petitioner, heroin and narcotics paraphernalia.

Simonini was originally charged as a co-defendant; however, prior to trial she

entered a plea of guilty. She testified at trial that the heroin found at Petitioner's residence had been brought there by her, that she did not have any agreement with Petitioner concerning distribution of the heroin, and that Petitioner had not supplied her with the heroin that she had sold to the narcotics agents. Her cross-examination by the prosecution was interrupted by a recess. She failed to appear when Court reconvened and never again testified.

During his testimony, Petitioner denied all of the allegations against him. During cross-examination, government counsel asked him the following question:

"And, didn't you tell her that if she [Simonini] did not help you, you would kill her?"

Petitioner's counsel objected to that question and moved for a mistrial on the grounds that government counsel did not have a good faith basis for asking it. The trial court did not

give a cautionary instruction following that question.

Out of the presence of the jury, government counsel stated that he had based the question on a report written by a narcotics agent which stated that, at the time of her arrest, Simonini had stated that she had been placed in a room by Petitioner, that she later left the house and rejoined two other persons and that she would not cooperate with the government because she was afraid that "'they' would kill her". The report did not explain either expressly or contextually whether "they" included Petitioner. The agent who had written the report testified that he had told government counsel that Simonini had told him that she would not cooperate because she was afraid that Petitioner would kill her and that the pronoun "they" in his report was meant to include Petitioner. However, the agent admitted

that neither he nor his report had informed government counsel that Simonini had said anything about being coerced to testify or being coerced not to testify. Simonini's counsel testified that he had told government counsel that she would not testify because she was afraid that if she did, she would be physically injured. He did not state whether she had indicated by whom she would be injured. The trial Court found that there had been a good faith basis for the question and upon that finding, denied the motion for a mistrial.

REASONS FOR GRANTING THE WRIT

Government counsel did not have a good faith basis for asking Petitioner, on cross-examination, the question "And, didn't you tell her that if she [Simonini] did not help you, you would kill her?" Government counsel's basis for asking that question rested solely on the conversations he had had with

the narcotics agent and on the narcotics agent's report. However, that report did not state, and the narcotics agent denied ever telling government counsel, that Simonini had ever claimed that Petitioner had coerced her into testifying in his favor. Furthermore, the agent's report stated merely that Simonini was frightened that if she cooperated with the government she would be killed by persons identified only by the pronoun "they". Although the narcotics agent testified that Petitioner was one of those persons, the most that the report indicated was that someone had attempted to coerce Simonini into not testifying against anyone. Clearly, this report did not give government counsel any reason to believe that Petitioner had coerced Simonini into testifying for him.

By asking that question without a good faith basis, government counsel violated his duty of fairness under Berger v. United States, 205 U.S. 78 (1934), the question was intended to,

and in fact did, place into the juror's minds the erroneous suggestion that Petitioner had coerced Simonini into giving testimony which exculpated him.

The fact that Simonini gave testimony favorable to Petitioner on direct examination and then disappeared during cross-examination dramatized the prosecutor's suggestion that Petitioner was exercising coercive control over Simonini. The question was so damaging and prejudicial that a cautionary instruction would not have minimized its impact. cf. Stewart v. United States, 366 U.S. 1 (1961). Thus, the trial Court's finding of good faith was clearly erroneous because it was not supported by any evidence in the record.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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June 21, 1979

DO NOT PUBLISH

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ANTHONY NOLAN,

Defendant-Appellant.

No. 78-3228

MEMORANDUM

[May 25, 1979]

Appeal from the United States District Court
for the Northern District of California

Before: WRIGHT and WALLACE, Circuit Judges, and
BELLONI, District Judge*

Nolan appeals his conviction for distribution, conspiracy to possess, and possession with intent to distribute heroin. He asserts error in the conduct of the prosecutor and the judge, the cross-examination of his co-defendant, the denial of his motion to suppress, and the admission of evidence seized at a co-conspirator's residence. We affirm.

Sharon Simonini sold heroin to a government agent on five occasions. During some transactions, agents observed Simonini with appellant just after her discussions with the agents and just prior to her producing heroin for sale to them. They had not seen appellant give heroin to Simonini, nor did she ever name him as her heroin source.

On one occasion after leaving appellant's home, Simonini told agents that she was at her "uncle's" house awaiting a heroin ship-

*Of the District of Oregon.

APPENDIX A

ment. She had referred previously to her heroin source as her "uncle."

Executing warrants, agents found heroin and heroin packaging paraphernalia at appellant's house and, at Simonini's house, more heroin, paraphernalia, and marked bills used for drug purchases. The court denied appellant's motion to suppress this evidence.

At trial, Simonini, who pleaded guilty, testified that the heroin was hers, that appellant never had supplied her with heroin, and that she had not conspired with him to distribute heroin. The government's cross-examination was interrupted by the noon recess and Simonini failed to return for further questioning. Appellant's testimony was consistent with that of Simonini.

PROSECUTORIAL MISCONDUCT

On cross-examination, the prosecutor asked appellant whether he had threatened Simonini in order to coerce her favorable testimony. Appellant asserts that the prosecutor lacked a good faith foundation for the questions. *United States v. Carter*, 454 F.2d 525 (9th Cir. 1972).

The court heard evidence and found that the prosecutor had asked the question in good faith. At the hearing, a government agent testified that he had told the prosecutor about Simonini's belief appellant would kill her. His crime report contained the same information. Simonini's attorney testified that he had told the prosecutor he believed Simonini feared physical danger if she cooperated with the government.

The court's finding of good faith was supported by substantial evidence and was not clearly erroneous. Consequently, the question was proper and no curative instruction was necessary. In any event, the court properly informed the jury that statements of counsel are not evidence.

**THE COURT'S CONDUCT AND THE LIMITATION
OF CROSS-EXAMINATION**

Appellant attacks the cumulative effect of the trial court's alleged improper imposition of time restraints on cross-examination, inquiry into the relevance of defense counsel's questions, admonitions regarding the pace of the trial, and participation in the examination

of the witnesses which, he contends, denied him his rights to confrontation and effective assistance of counsel.

The court has broad latitude to control the presentation of evidence and the scope of cross-examination, Fed. R. Evid. 611(a), (b), and may inquire into the relevance of evidence, Fed. R. Evid. 403. We have examined the record and find no abuse of discretion.

The court's comments "were neither calculated to disparage [appellant] in the eyes of the jury, nor likely to affect the outcome of the trial." *United States v. Eldred*, 588 F.2d 746, 750 (9th Cir. 1978). The judge's intervention in questioning was intended to aid the witnesses and fell far short of assumption of the prosecutorial role. *Id.* at 751.

The record shows that appellant received effective assistance of counsel. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc). Neither the individual assignments of error nor their cumulative effect violates the Sixth Amendment.

CROSS-EXAMINATION OF CO-DEFENDANT

The court ruled that the government could not impeach appellant's co-defendant, Heuser, with his prior conviction for possession of heroin. Fed. R. Evid. 609. On cross-examination, the prosecutor inquired into Heuser's familiarity with drugs and elicited details of his experience with drugs.

Appellant's argument that these questions amounted to inquiry into the prior conviction and that he was prejudiced by implication through the conspiracy charge is meritless. The prosecutor never inquired into the fact of Heuser's conviction and the questions asked were permissible to prove Heuser's knowledge and intent under Fed. R. Evid. 404(b). See *United States v. Batts*, 573 F.2d 599, 603 (9th Cir.), *cert. denied*, ... U.S. ..., 99 S.Ct. 178 (1978).

DENIAL OF THE MOTION TO SUPPRESS

Appellant requested an evidentiary hearing to establish the insufficiency of the affidavit for the warrant to search his home. Fed. R. Crim. Proc. 41(e). The court denied the motion to suppress without mentioning the request for an evidentiary hearing.

Evidentiary hearings are not required in all cases, but only when the moving papers, together with affidavits, "enable the court to conclude that a substantial claim is presented . . . and factual issues are raised." *Cohen v. United States*, 378 F.2d 751, 760-61 (9th Cir. 1967).

Appellant raised no factual issues, but merely asserted that the affidavit was insufficient and the information was stale. No hearing was required.

The affidavit recited Simonini's connection with appellant based on police surveillance. It described drug transactions to the date of the issuance of the warrant. The information was not stale and it provided ample basis for the court to conclude "that criminal activity is probably shown." *United States v. Fried*, 576 F.2d 787, 790 (9th Cir.), *cert. denied*, ... U.S. ..., 99 S.Ct. 255 (1978).

EVIDENCE FROM CO-CONSPIRATOR'S HOME

Appellant's assertion that evidence seized at Simonini's home is irrelevant to his guilt is frivolous. The evidence bore directly upon the conspiracy charge and appellant was linked to the conspiracy through Simonini and other co-conspirators. Their acts in furtherance of the conspiracy are attributable to him. See *United States v. Testa*, 548 F.2d 847, 855 (9th Cir. 1977).

AFFIRMED. The mandate will issue immediately. Release on bond is revoked now.